January 27, 1998

U.S. Department of Energy
Office of General Counsel
GC-52
1000 Independence Avenue, SW
Washington, D.C. 20585

REPORT TO CONGRESS ON THE PRICE-ANDERSON ACT

I appreciate the opportunity on behalf of Battelle Memorial Institute to respond to the Department of Energy's December 31, 1997 Federal Register "Notice of inquiry concerning preparation of report to Congress on the Price-Anderson Act." Battelle is a nonprofit charitable trust, devoted principally to research and development, education, technology transfer and scientific innovation. Battelle has a vital interest in this report in view of its operational role at two national laboratories and other DOE facilities. Battelle also supports DOE and other Federal agency activities in international nuclear non-proliferation and related national security projects. We currently manage and operate the Pacific Northwest National Laboratory in Richland, Washington, on behalf of the Department of Energy. Further, we are in the process of transitioning management of the Brookhaven National Laboratory to Brookhaven Science Associates, a Battelle-affiliated not-for-profit organization. Battelle has been involved in the Atomic Energy programs of the United States since 1942 and is proud of the contribution we have been able to make to the nation in the ensuing years.

Battelle's comments will focus on the following three ideas. First, we strongly support extension of the indemnification protections of the Act. Second, Battelle supports the continuing interest in contractor accountability for nuclear safety compliance, though we believe that contractors have always been, and remain, accountable through contractual provisions and we do not believe that a separate civil penalty sanction is necessary or adds value to safety performance. Finally, in the absence of eliminating the civil penalty provisions, Battelle supports continuing and expanding the exemption from civil penalties for all nonprofit and educational organizations supporting DOE's nuclear activities.

INDEMNIFICATION

Battelle supports extension of section 170 of the Price-Anderson Act. The indemnity provisions of the Act have been and remain an essential condition of our contractual relationships with DOE. The present system of indemnification afforded by Price-Anderson is well understood by DOE prime contractors, particularly those managing, operating or

integrating work at the DOE's national laboratories and other principal facilities. Without Price-Anderson's indemnification protection and limitation on liability for nuclear incidents, few contractors could or would prudently continue providing nuclear services or goods to DOE.

We believe that few companies, for-profit or not-for-profit, would be able to continue to support DOE nuclear or radiological activities without Price-Anderson indemnity. This includes support to all areas of DOE's current mission, including research and development, D&D, environmental cleanup and remediation, weapons production, nuclear nonproliferation and stockpile stewardship. The need for DOE to provide continuation of Price-Anderson indemnity to its contractors under risk of a nuclear incident remains clear. While the risk of occurrence of an incident is probably even more remote now than during the nuclear weapons production era, the magnitude of the risk is immeasurably greater. This is largely due to the increasing litigious nature of society and claims consciousness of for-profit and nonprofit organizations. While the possibility of a major nuclear incident is remote, the ultimate risk to Battelle or any other contractor without full indemnification is so catastrophic that it would be difficult to envision any corporation or organization going forward with the potential "bet the company" liabilities that could arise from a nuclear incident.

Battelle continues to support indemnification for nuclear incidents that may result from gross negligence or willful misconduct. Unauthorized actions by a rogue employee are the simplest manifestation of our concern. Further, we are apprehensive about the legal uncertainties of distinguishing between "gross" and standard negligence, or between "willful" and negligent misconduct. Such uncertainties, particularly with today's juries, are further reasons for companies not to bid DOE nuclear work in the absence of broad indemnification protection.

Given the diversity of today's DOE mission, we believe the Act should be amended to provide that the presence of U.S. "owned" nuclear material in a nuclear incident is not required in order for Price-Anderson indemnity coverage to apply to overseas nuclear activities. See 42 U.S.C. 2014(q). Such an amendment should clearly state that all such international nuclear work sponsored by the Department is covered by the same indemnity provisions as apply to work conducted within the United States. Carrying out DOE nuclear and national security activities in support of nuclear non-proliferation or safeguards and security functions is sufficient to justify indemnification coverage.

Extending the essential elements of the Price-Anderson Act will enable DOE to continue operations of its principle nuclear facilities and programs without disruption. Any significant diminution of Price-Anderson indemnification protections would likely result in further shrinking of the available pool of organizations willing to accept the challenges of DOE nuclear work.

Indeed, as a charitable, nonprofit organization, Battelle would find it impossible to justify putting its collective assets at risk to perform DOE nuclear work with potentially unlimited liability risk.

CONTRACTOR ACCOUNTABILITY

Battelle supports the objective of Congress and the Department in enhancing contractor responsibility for operating the Department's nuclear facilities. As we noted in public comments prior to reauthorization of Price-Anderson ten years ago, the avoidance of damage to Battelle's worldwide reputation for excellence is a compelling incentive to assure its conduct of operations in a safe manner. Nonprofit organizations are extremely sensitive to their reputation, among the public, community interest groups, and other stakeholders. Contractors, particular nonprofit organizations, have always regarded their participation in the Atomic Energy programs of the Department of Energy and its predecessors as a public-spirited effort towards furtherance of national objectives.

However, we remain concerned about the impact of the Department's role as both customer and regulator. After prolonged debate in both the House of Representatives and the Senate, the final version of the 1988 Amendments emerged with both civil and criminal penalty provisions, along with exemptions from civil penalties for certain nonprofit contractors. The civil penalty provision provides that any indemnified contractor (or any subcontractor or supplier thereto) who violates "any applicable rule, regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy" shall be subject to a maximum civil penalty of $100,000 for each violation. Indeed, civil penalties have recently risen above $100,000 per Price-Anderson enforcement action, an outcome specifically resulting from DOE's recently revised enforcement policy and guidelines. Some enforcement actions seem appropriate and consistent with the Department's goals, i.e. protection of workers and the environment from nuclear safety deficiencies. Most of these enforcement actions appear to result from willful misconduct or clearly outrageous conduct. Other enforcement actions are more troubling as they seem little more than punishment for programmatic weaknesses and "less than adequate" results.

While DOE contractors share in the responsibility for the safe operation of the facilities they operate, DOE retains the ultimate responsibility with respect to the facilities it owns. This is a necessary and logical consequence of the fact that the Department controls (along with the Congress) the purse strings to operate these facilities. Indeed, DOE contractors have

absolutely no control over the amount of money appropriated for operation or upgrading of DOE facilities, and little control over programmatic allocations for safety and compliance activities.

Through its field offices, the Department is actively involved with its contractors in the operation of its facilities on a daily basis. Recent growth of DOE technical staffs, the Facility Representative program, and programmatic oversight, along with state and federal regulatory agency staff integration into site operations, provides tremendous safety and environmental protections. If safety issues arise, including nuclear safety concerns, the Department participates in developing solutions, monitoring progress, and as always, provides the funds necessary to implement corrective actions. Preserving this partnership with DOE, through trust, credibility, and open and effective communication, is essential in carrying out programs vital to national defense, preserving and restoring the environment and in promoting technology transfer and economic development. Where there is obvious contractor malfeasance or nonfeasance, DOE may reduce fee, seek reimbursement of unallowable costs, terminate contracts, utilize debarment options, or where appropriate, refer criminal prosecution. With so many other available options, the civil penalty sanction does not introduce an essential tool to achieve the Department's objectives.

CIVIL PENALTY EXEMPTION

In enacting the 1988 Amendments, the Congress recognized that the community of DOE contractors included organizations ranging from universities and other nonprofit organizations to large industrial corporations. The provisions of the civil penalty section of Price-Anderson are specifically made not applicable to seven named contractors, mostly university and nonprofit organizations, which operate certain national laboratories and similar facilities of the Department. However, these exempted organizations remain subject to regulatory citation and potential criminal penalties. Furthermore, the Secretary was directed to determine by rulemaking whether other nonprofit educational institutions should receive automatic remission of any penalties imposed under the section.

Pacific Northwest National Laboratory as operated by Battelle, and Brookhaven National Laboratory as operated by Associated Universities Incorporated (AUI), were among those specifically exempted by statute from civil penalties. This exemption for activities associated with Brookhaven National Laboratory applies only to AUI. This exemption will not apply to Brookhaven Science Associates (BSA), the nonprofit entity formed by Battelle and the Research Foundation of the State University of New York, which will soon assume management of Brookhaven. However, BSA retains the not-for-profit characteristic which led

Congress in 1988 to exempt the not-for-profit contractors from the imposition of section 234A civil penalties.

The Act's exemption from civil penalties should cover all non-profit entities engaged in operating DOE facilities, not just the specific ones listed in the 1988 Amendments. (In an era of increased competition and contract turnover at DOE facilities, the 1988 "listing" approach is very inefficient to achieve Congress' objective.) The very nature of the work conducted by the non-profits, i.e., cutting-edge scientific research and development, implies that these institutions/non-profit entities are engaging in activities that present inherent risk beyond that normally found and understood in the nuclear industry. Such institutions/entities should not be forced to choose between continuing to conduct valuable research on the one hand, and putting their assets at risk on the other, particularly when the assets have been accumulated for a public purpose.

Civil penalties are not necessary to incentivize the non-profits because safety compliance can effectively take place within the context of contractual mechanisms, including performance fees, which can be significantly reduced when the contractor is not meeting certain standards set forth in the contract. A reduction in performance fees, or future competitiveness, are more appropriate mechanisms than civil penalties when the government seeks to punish a nonprofit contractor in the context of innovative research work, as opposed to standard "industrial" type nuclear work. The reasons that prompted the Congress to originally exempt the nonprofits from civil penalties are no less valid today than when the exemption was put in place. We believe that Battelle's past, present and future commitment to safety, quality and excellence of performance remains paramount. However, DOE has the ability to reduce fee for safety performance below the Department's expectations and has exercised this authority across the contractor community.

Battelle has put in place and executed effective Price-Anderson compliance programs at least as rigorous as for-profit contractors subject to civil penalties. The civil penalties in and of themselves do not drive safety, or nuclear safety compliance. Impacts to reputation, competitiveness and fee earned drive corporate compliance, as well as management commitment to excellence and "doing the right thing."

We look forward to continuing our long partnership with DOE in advancing the national interest in science, technology, national security and educational outreach.

Very truly yours,

Jerome R. Bahlmann
Senior Vice President and General Counsel

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